84-1703

No.....

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

ANTHONY EHLENFELDT,

Petitioner,

v.

C. W. TRANSPORT, INC., LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WILLIAM CLOSE, THOMAS O'MALLEY, LEROY RANKIN, AND FRANK WSOL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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40pp

QUESTIONS PRESENTED

The Court of Appeals ruled that Ehlenfeldt must show intentional misconduct on the Union's part and that he failed to do so. The questions presented on this petition are:

1. What is the standard of conduct governing the duty of fair representation and the breach thereof under Section 301 of the National Labor Relations Act (29 U.S.C. § 185)?

2. Assuming the Court of Appeals applied the correct standard of conduct below, did the Court nevertheless err in affirming the District Court's order granting the motions of respondents for summary judgment?

PARTIES

The petitioner, Anthony Ehlenfeldt ("Ehlenfeldt") respectfully prays that a writ of certiorari issued to review the Judgment and Order of the United States Court of Appeals for the Seventh Circuit entered January 29, 1985.

The named parties are the only parties to this litigation.

OPINION BELOW

The Order (opinion) of the Court of Appeals for the Seventh Circuit, not published, appears in Appendix A to this Petition. The decision rendered by the United States District Court for the Western District of Wisconsin on respondents' motion for summary judgment appears in Appendix B. The Judgment of the Court of Appeals appears in Appendix C and the Judgment of the District Court appears in Appendix D. 29 U.S.C. Section 185 appears in Appendix E.

JURISDICTION

The Judgment and Order of the Court of Appeals for the Seventh Circuit was entered on January 29, 1985. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

TABLE OF CONTENTS

	Pages
Questions Presented	i
Parties	ii
Opinion Below	iii
Jurisdiction	iii
Statutes Involved	1
Statement of the Case	1
Reasons for Granting the Writ	5
I. The Standard Of Intentional Misconduct Of The Seventh Circuit Is In Conflict With The Decisions Of This Court Because It Does Not Recognize The Arbitrary Or Perfunctory Breach Of The Duty Of Fair Representation.	5
II. The Standard Of Intentional Misconduct Of The Seventh Circuit Is In Conflict With The Standard Of Conduct Applied By Several Of The Other Circuit Courts Of Appeal.	8
III. Even Assuming The Intentional Misconduct Standard Applied By The Seventh Circuit Is The Correct Standard, The Seventh Circuit Nevertheless Erred When It Applied The Standard To The Individual Facts Of This Case.	10
Conclusion	11
Appendix:	
A. Seventh Circuit's Order	App. 1
B. District Court's Memorandum and Order	App. 6
C. Seventh Circuit's Judgment	App. 18
D. District Court's Judgment	App. 20
E. 29 U.S.C. Section 185	App. 21

TABLE OF AUTHORITIES

Cases

	Pages
Baldini v. Local 1095, VAW, 581 F.2d 150 (7th Cir. 1978)	6
Curtis v. United Transp. Union, 700 F.2d 457, 458 (8th Cir. 1983)	9
Dober v. Roadway Express, Inc., 707 F.2d 292 (7th Cir. 1983)	4, 5
Dutrisac v. Caterpillar Tractor Co., 113 LRRM 3532, 3537 (9th Cir. 1983)	9
Egger v. Phillips, 669 F.2d 497, 502 (7th Cir. 1982)	11
Farmer v. ARA Services, Inc., 660 F.2d 1096, 1103 (6th Cir. 1981)	9
Faust v. International Brotherhood of Elec. Workers, 572 F.2d 710, 715 (10th Cir. 1978)	9
Griffin v. Intl. Union, United Auto Workers, 469 F.2d 181, 183 (4th Cir. 1972)	9
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1975)	6, 7
Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981)	4, 5
Retan v. Apartment, Motel, Hotel and El. Op. U., Local 14, 453 F.2d 1018, 1023 N.8 (9th Cir. 1972)	9
Vaca v. Sipes, 386 U.S. 171 (1966)	5, 6, 7, 8, 9

Statutes

28 USCS § 1254(1)	iii
29 USCS § 185	1
Labor Management Relations Act § 301	1

OTHER

Pages

Gorman, Basic Text on Labor Law (1976), page 720 _ 6

Jones, The Origins Of The Concept Of The Duty Of Fair Representations, THE DUTY OF FAIR REPRESENTATION (1977), page 37 ..... 6, 7

STATUTES INVOLVED

Ehlenfeldt brought this action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. This statute is set forth in Appendix E.

STATEMENT OF THE CASE

This petition arises from the District Court's order granting the respondents' motion for summary judgment and dismissing the petitioner's complaint as amended in *Anthony Ehlenfeldt v. C. W. Transport, Inc., Local Union No. 710 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, William Close, Thomas O'Malley, Leroy Rankin, and Frank Wsol,* Civil Action No. 82-C-768-S (W.D. Wis.), an action filed by Ehlenfeldt on September 24, 1982. Ehlenfeldt's complaint as amended alleges that the Company wrongfully discharged him from his position of employment and that the Union breached the duty of fair representation which it owed him, all in violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185.

Ehlenfeldt's amended complaint alleges that the Union and the Company conspired to deprive Ehlenfeldt of substantial pension benefits to which he was entitled under the Local 710 International Brotherhood of Teamsters Pension Plan ("Plan"). Ehlenfeldt was employed by the Company as an over-the-road driver for 19½ continuous years of service preceding his discharge of March 25, 1982. At the time of his discharge, Ehlenfeldt was 51

years of age and had earned 19 years of pension credit under the Plan. A minimum of 20 years of pension credit is required before an employee becomes eligible for a majority of the benefits made available under the Plan. Ehlenfeldt became ineligible to participate in the majority of these benefits at the time of his discharge since it occurred some 6 months prior to the vesting of his 20th pension credit.

Both the Company and the Union had knowledge as to Ehlenfeldt's pension status. Ehlenfeldt desired to participate in the Early Retirement Benefit. In October of 1981 or approximately 5 months prior to his discharge, Ehlenfeldt informed the Company that he was planning to retire upon the completion of his 20th year of employment so that he could get the 20 year retirement. The Company responded by stating that Ehlenfeldt was not old enough to retire. Similarly, Ehlenfeldt's Union steward told Ehlenfeldt after the arbitration hearing regarding his discharge that he thought Ehlenfeldt did not have enough pension credits to be eligible for this particular plan.

Ehlenfeldt was discharged for the alleged delay of freight. Ehlenfeldt grieved that his discharge was not for just cause because his delay of freight was excusable in that he had become ill by way of exhaust fumes entering the cab of his truck. Because of his illness, Ehlenfeldt was obligated to immediately cease operation of his vehicle pursuant to applicable Motor Carrier Safety Regulations.

The Union, Ehlenfeldt claims, failed to represent him. The Union did not investigate the mechanical condition of

the vehicle which Ehlenfeldt was operating. They did not contact the driver who operated the vehicle after Ehlenfeldt. They did not review Ehlenfeldt's personnel file even though they were aware that it might have contained supportive information. They advised Ehlenfeldt not to bring supportive documentation to the hearing. They advised Ehlenfeldt to execute a Waiver of Ten Day Notice despite the fact that Ehlenfeldt's Union representative had done nothing with respect to Ehlenfeldt's grievance prior to the arbitration hearing. They allowed the Company to present evidence at the hearing which should have been disallowed pursuant to the collective bargaining agreement. They failed to present evidence of Ehlenfeldt's numerous safe-driving awards. They failed to bring up Ehlenfeldt's seniority even though they knew this was a good crutch to grab onto. They failed to present Ehlenfeldt's rebuttal letter at the hearing and instead instructed Ehlenfeldt not to present a written argument which he had prepared prior to the hearing. Indeed, the Union appeared at Ehlenfeldt's arbitration hearing with an empty file.

Perhaps of even greater importance, the Union failed to show that Ehlenfeldt was the victim of discrimination. Of the approximately 85 truckers within Ehlenfeldt's division at the Company, 30 had experienced problems with delay of freight on a continuous basis; had received frequent warning letters; and yet only one of those employees was discharged. The one employee who was discharged for delay of freight was actually reinstated the next day. However, this employee was again discharged for delaying freight during his very next shift. Ehlenfeldt was

singled out for his delay of freight because of his pension status.

The arbitration hearing lasted approximately 20 minutes. The arbitration committee comprised solely of Union and Company representatives simply denied Ehlenfeldt's grievance without indicating the basis for its decision. Their only written decision was the statement "Appeal Denied, Discharge Stands."

On January 27, 1984, the District Court granted the motions of the respondents for summary judgment and ordered Ehlenfeldt's complaint dismissed. Relying upon *Hoffman v. Lonza,* 658 F.2d 519 (7th Cir. 1981) and *Dober v. Roadway Express, Inc.,* 707 F.2d 292 (7th Cir. 1983), the District Court ruled that an inference of intentional misconduct could not be made. This resulted in a final judgment dated February 7, 1984 which was appealed to the Seventh Circuit.

On January 29, 1985, the Seventh Circuit issued an order affirming the District Court's order and judgment. The Seventh Circuit acknowledged that *Hoffman* and *Dober* were controlling and required a showing of intentional misconduct. The Seventh Circuit conceded that Ehlenfeldt had presented a theory of malicious discrimination regarding his pension status but ruled that Ehlenheldt had failed to prove that his theory was actually operative in practice. This order of the Seventh Circuit resulted in a judgment of the same date which is the basis of the instant petition.

REASONS FOR GRANTING THE WRIT

I.

The Standard Of Intentional Misconduct Of The Seventh Circuit Is In Conflict With The Decisions Of This Court Because It Does Not Recognize The Arbitrary Or Perfunctory Breach Of The Duty Of Fair Representation.

The Seventh Circuit, in affirming the District Court's order granting the motions of the respondents for summary judgment, relied solely on the standard of "intentional misconduct" as adopted in *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981) and confirmed in *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983). In *Dober* the Seventh Circuit stated in no uncertain terms the standard it was bound to follow:

> There are many suits in this Circuit over the duty of fair representation, and potential parties to those suits—workers, unions, employers—and the bar of this Circuit have a right to know what standard we follow, so we reaffirm that the standard is "intentional misconduct." 707 F.2d at 295.

The Seventh Circuit's standard of intentional misconduct conflicts with this Court's standard regarding the breach of the duty of fair representation. This Court in *Vaca v. Sipes*, 386 U.S. 171 (1966) enunciated the legal standard for duty of fair representation cases. A "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." 386 U.S. at 190. In the context of the Union's duty to enforce the grievance and arbitration procedures

in a collective bargaining agreement, this Court held that there was no breach by the union's exercising its discretion in deciding not to appeal a grievance to arbitration. But, at the same time, this Court further held that a union could have violated its duty to the claimant had it "arbitrarily ignore(d) a meritorious grievance or process(ed) it in perfunctory fashion." 386 U.S. at 191.

Clearly, "processing a grievance in a perfunctory manner" implies a broader standard than intent, and reflects the Court's concern with the quality and manner of the union's performance. *Jones, The Origins Of The Concept Of The Duty Of Fair Representation,* THE DUTY OF FAIR REPRESENTATION (1977), page 37. Indeed, "the reference in the Supreme Court decision in *Vaca* . . . to 'perfunctory' processing of grievances invites the finding of a violation when injury is caused by union carelessness without more." *Gorman, Basic Text on Labor Law* (1976), page 720.

In fact, the standard actually represents a range from negligence to intentional. The standard "arbitrary, discriminatory or in bad faith" is disjunctive. *Vaca* expressly rejected an argument that only obvious breaches such as discrimination or hostile treatment would be actionable. *Dober,* 707 F.2d at 296 (quoting *Baldini v. Local 1095, VAW,* 581 F.2d 150 (7th Cir. 1978) (Cudahy, J., concurring)).

This Court in *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1975) *sub silentio* approved a gross negligence standard for duty of fair representation claims. In *Hines,* the union had carried a grievance through arbitration, but failed to investigate the employer's charges

against the employees, or to present any other evidence at the arbitration hearing.

The District Court had granted a motion for summary judgment for both the union and the employer, concluding that although the facts demonstrated the union's bad judgment and failure to meet professional standards of competence, there were insufficient facts to show a breach of the duty of fair representation by the union and that therefore the arbitration committee's decision was final and binding on the employees. In review, the Court of Appeals for the Sixth Circuit concluded that the facts were sufficient to support an inference of bad faith or arbitrary conduct on the part of the union. The Sixth Circuit, however, upheld the dismissal of the employer, on the theory that there was no evidence of any misconduct on the part of the employer, and wholly insufficient evidence of any conspiracy between the union and the employer. It was on the latter issue that this Court reversed, holding that the employer need not be implicated in the bad faith or misconduct of the union to sustain an action by the employees against the employer for breach of contract.

Significantly, this Court did not take issue at all with the Sixth Circuit on the issue of the breach of the duty of fair representation by the union. See *Jones, id.*, page 41. In fact, this Court supported the extension of a duty of fair representation action, under the *Vaca* standard, to a post-arbitration context.

This Court in *Hines* again reiterated the union's duty to represent employees "honestly and in good faith and without discrimination or arbitrary conduct and stated

that the ruling in *Vaca* stemmed from an evaluation of the manner in which the union had handled a grievance in its earlier stages and that a union could breach the duty of fair representation if it utilized the contractual grievance procedures in such a way as to "seriously undermine the integrity of the arbitral process." 424 U.S. 567, 570. Thus, this Court, by inference, has approved the extension of the *Vaca* standard to a consideration of the Union's manner of processing a grievance through arbitration. By not taking issue with the Sixth Circuit's decision, this Court has *sub silentio* approved a gross negligence standard within the grievance processing context.

It should be clear that intentional misconduct is not the *sine qua non* of a breach of the duty of fair representation. The Seventh Circuit's reliance upon intentional misconduct as a sole standard of governing the breach of the duty of fair representation conflicts with this Court's prior decisions on the matter. The legal standard of this Court for the breach of the duty of fair representation is broader than "intentional misconduct." This conflict must be resolved.

II.

The Standard Of Intentional Misconduct Of The Seventh Circuit Is In Conflict With The Standard Of Conduct Applied By Several Of The Other Circuit Courts Of Appeal.

At a minimum, the standard of intentional misconduct espoused by the Seventh Circuit is in direct conflict with the standard of conduct applied by the Circuit Courts of Appeal in the Fourth Circuit, Sixth Circuit, Eighth

Circuit, Ninth Circuit, and Tenth Circuit. Those circuits are of the opinion that the standard for the breach of the duty of fair representation is broader than the standard of intentional misconduct as adopted by the Seventh Circuit. See *Griffin v. Intl. Union, United Auto Workers,* 469 F.2d 181, 183 (4th Cir. 1972) [breach may be established without any hostile motive of discrimination and in complete good faith where a course of action or inaction is unreasonable and arbitrary]; *Farmer v. ARA Services, Inc.,* 660 F.2d 1096, 1103 (6th Cir. 1981) [bad faith or fraud is not a necessary element of a charge of unfair representation if the union's conduct is otherwise arbitrary or perfunctory]; *Curtis v. United Transp. Union,* 700 F.2d 457, 458 (8th Cir. 1983) [to support a claim that the union acted in a perfunctory manner, there must be evidence that the union acted without concern or solicitude, or gave a claim only cursory attention]; *Dutrisac v. Caterpillar Tractor Co.,* 113 LRRM 3532, 3537 (9th Cir. 1983) [union negligence may breach the duty of fair representation in cases where the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim]; *Faust v. International Brotherhood of Elec. Workers,* 572 F.2d 710, 715 (10th Cir. 1978) [union's duty includes an obligation to avoid arbitrary conduct].

The Fourth Circuit in *Griffin* indicated that "[t]he repeated references in *Vaca* to 'arbitrary' union conduct reflected a calculated broadening of the fair representation standard. *Id.* at 183 (quoting *Retan v. Apartment, Motel, Hotel and El. Op. U., Local 14,* 453 F.2d 1018, 1023 N.8 (9th Cir. 1972) [Feller, "*Vaca v. Sipes,* One Year

Later'' in N.Y.U. 20—First Annual Conference on Labor 141, 167 (1969)). This is the very acknowledgment that the Seventh Circuit has failed to make. The Circuit Courts of Appeal are in disagreement and will remain so until this Court makes a definitive statement as to the specific standard of conduct to be applied to the duty of fair representation and the breach thereof. Such clarification is needed at the present time.

III.

Even Assuming The Intentional Misconduct Standard Applied By The Seventh Circuit Is The Correct Standard, The Seventh Circuit Nevertheless Erred When It Applied The Standard To The Individual Facts Of This Case.

The District Court in considering the motions of the respondents for summary judgment, stated that "this Court can accept for purposes of this motion" that:

> Ehlenfeldt has arguably established that the Union and its agents failed to investigate his grievance; failed to adequately advise him as to the Waiver Agreement; permitted the Company to make reference to warning letters far outside the nine month prohibition within the Agreement; failed to present Ehlenfeldt's letter and rebuttal to the warning letter of October 29, 1981; and failed to present supportive information in Ehlenfeldt's defense. Further, Ehlenfeldt has arguably established that the company and its agents terminated Ehlenfeldt without just cause and that numerous other employees were also guilty of delay of freight and yet were not discharged. Appendix at page 12.

These facts, when viewed in light of the respondents' motive to deprive Ehlenfeldt of his substantial pension

benefits created a material issue of fact as to whether or not the Union had breached its duty of fair representation. This is especially true since summary judgment is particularly inappropriate where the underlying issue is one of motive or intent. *Egger v. Phillips,* 669 F.2d 497, 502 (7th Cir. 1982).

Even assuming that the standard of intentional misconduct was the standard to apply in this case, the Seventh Circuit applied that standard incorrectly to the facts of this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner,
Anthony Ehlenfeldt

Dated at Madison, Wisconsin, this 29th day of April, 1985.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued November 2, 1984

January 29, 1985

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. CLEMENT F. HAYNSWORTH, JR., Senior Circuit Judge*

ANTHONY EHLENFELDT,

Plaintiff-Appellant,

No. 84-1302 vs.

C. W. TRANSPORT, INC. AND LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN AND HELPERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 82 C 781
John C. Shabaz, Judge

---

*The Honorable Clement F. Haynsworth, Jr., United States Senior Circuit Judge for the Fourth Circuit Court of Appeals, sitting by designation.

ORDER

After an arbitration committee upheld Ehlenfeldt's discharge by his employer, C. W. Transport, Inc., he brought this action charging his local union with violation of its duty of fair representation and his employer with breach of contract in effecting his discharge. Summary judgment went against him in the district court.

I.

Plaintiff was discharged from his job as a truck driver for excessive delays in the delivery of freight. He claimed that the delay on the occasion which precipitated the discharge was necessitated by the fact that the cab had filled with exhaust fumes and that his stop was justified as a safety precaution.

The union steward assisted him in filing a grievance, and the union agent, Wsol, unsuccessfully sought to persuade the employer to reinstate him. The matter was then taken to the contract grievance procedure.

Accompanied by the union steward and the union agent, Ehlenfeldt appeared before the arbitration committee for a hearing. It was then explained to him that he was entitled to prior notice of ten days, which had not run, and that he was entitled to additional time if he wished it. Indeed, he was admonished about the matter more than once, but he insisted that he wished the hearing to proceed that day. At the conclusion of the hearing, the plaintiff stated that his entire case had been presented.

Thereafter, the committee upheld the discharge.

II.

The plaintiff complains that the union mishandled his grievance. He charges that the investigation before the hearing was inadequate and that the union representatives should not have permitted him to sign a waiver of the ten-day notice to which he was entitled. He complains of the receipt by the committee of a warning letter issued within the contractually allowable nine month period preceding the termination, but which contained references to earlier warnings issued more than nine months before his discharge. Finally, he complains that the union representatives failed to present a letter written by the plaintiff in response to the last warning letter he had received.

Oddly, no one sought to introduce any information about the condition of the truck and a possible malfunction in its exhaust system.

All of this suggests that union representatives might have been better prepared than they were, and that their representation was substantially imperfect. That is beside the point, however, for the plaintiff cannot maintain in the district court an action for breach of his union's duty of fair representation unless he can show intentional misconduct on the union's part. *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1982); *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981). Unintentional conduct by union officials might constitute an unfair labor practice within the remedial jurisdiction of the National Labor Relations Board, but the federal courts should not preempt the Board's exclusive jurisdiction to adjudicate such matters. *See Amalgamated Assn. of Street, Electric,*

Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971).

III.

The plaintiff attempted to meet his burden of showing deliberate union misconduct. The plaintiff asserts that at the time of his discharge he had earned nineteen years of credits under the Teamsters Pension Plan. Under that Plan, many benefits would have vested after completion of twenty years' service, but upon his termination after only nineteen years of service, his eligibility was computed on the basis of only ten years of service.

Presentation of a theory of malicious subordination of his rights is not enough. If he is to avoid summary judgment against him, he must introduce evidence that the theory was operative in practice and that he was actually the victim of intentional misconduct consistent with the theory. *Graf v. Elgin, Joiliet & Eastern Ry. Co.*, 697 F.2d 771 (1983).

The plaintiff offered nothing to prove that his theory was actually operative in practice. There was no proof that union representatives had any incentive to protect the fund from properly maturing claims. There was no suggestion of a practice of acquiescence in the discharge of employees whose retirement rights were near the vesting point. The plaintiff had been reinstated after an earlier discharge after intervention of union representatives, and the plaintiff had enjoyed good and amiable relations with the union representatives.

Thus, while he offers a bare theory of malicious discrimination against him, there is not a shred of evidence to support it.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-781-S

ANTHONY EHLENFELDT,

Plaintiff,

vs.

C. W. TRANSPORT, INC.; LOCAL UNION No. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; WILLIAM CLOSE; THOMAS O'MALLEY; LEROY RANKIN and FRANK WSOL,

Defendants.

MEMORANDUM AND ORDER

Before the Court are motions for summary judgment by each of the defendants. This is an action pursuant to § 301 of the Labor Management Relations Act (29 U.S. C. § 185), charging that plaintiff's discharge from employment was without good cause, in violation of the collective bargaining agreement then in effect between his employer and union, and also charging that his union failed in its duty of fair representation. The issue presented by the motions is whether there are sufficient facts to require a trial on the issue of whether the union failed to fairly represent the plaintiff, given the standard of default necessary to make out such a case.

The facts, which are taken in the light most favorable to the plaintiff are as follows:

Copy of this document has been mailed to the following Attys. Gingras, Pierce, Benn & Uelmen, the 27th day of January, 1984, by [illegible].

FACTS

Plaintiff, Anthony Ehlenfeldt, is a resident of the State of Illinois. He was employed as an over-the-road truck driver by defendant C. W. Transport, Inc., a Delaware corporation with its principal place of business in Wisconsin Rapids, Wisconsin (hereinafter, the "employer").

Plaintiff was discharged from his employment on March 25, 1982, the employer charging that plaintiff was being discharged for failure to make a timely delivery of freight to Mauston, Wisconsin on March 24, 1982. Plaintiff had been employed by the employer for approximately 19½ years.

Plaintiff was a member of Local 710, International Brotherhood of Teamsters, based in Chicago, Illinois (hereinafter, the "union"). There was at the time of the discharge a collective bargaining agreement in effect between the union and the employer which, among other things, provided that the employer was not to discharge an employee except for cause.

The plaintiff, the employer and the union were, respectively: an "employee;" an "employer" engaged in an "industry affecting commerce;" and a "labor organization" representing employees in an "industry affecting commerce," as defined in the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* (hereinafter, the LMRA).

William Close and Thomas O'Malley are residents of Illinois and are officers and employees of the employer.

LeRoy Rankin and Frank Wsol are residents of Illinois and are officers of the union.

Plaintiff filed a grievance pursuant to the provisions of the collective bargaining agreement relating to his discharge. He asserted that the stated reason for the discharge was a pretext, and that the real reasons were that, first, his pension rights would have vested within six months of his discharge and the employer did not wish this event to occur; and second, the employer wished to penalize plaintiff for complaining of health and safety problems on the trucks that he drove. With respect to the incident on which his discharge was predicated, plaintiff claims that exhaust fumes were entering the truck which made him sick and which necessitated a stop during which he could recover from his exposure to the fumes.

Plaintiff had been cited for late deliveries on a number of occasions prior to this time. The most recent warning for such conduct was approximately six months before. Plaintiff had submitted a letter to the company regarding this warning. Other warning citations received by plaintiff were in excess of nine months old. The collective bargaining agreement did not allow consideration of warnings received more than nine months before the filing of a grievance.

Pursuant to the collective bargaining agreement, plaintiff was afforded a hearing before the Joint State Committee concerning his discharge. Plaintiff was accompanied by a union representative, defendant Frank Wsol.

Prior to the hearing, plaintiff spoke with another union representative, defendant LeRoy Rankin. Rankin informed plaintiff of the hearing and told him that the union would take care of his representation. Wsol's only contact with plaintiff prior to the hearing concerned the filing of the grievance itself.

The union made no attempt to check the mechanical operation of the truck that plaintiff had been driving. The letter plaintiff had written concerning the warning six months earlier was not put in evidence either. Wsol did not review plaintiff's personnel record because he did not have time.

Plaintiff signed a waiver of his right to ten days notice of hearing. Wsol did not advise plaintiff to not sign the waiver, and stated, in his deposition, that it is not his duty to determine whether the grieving employee is ready for the hearing.

Plaintiff's letter of termination was presented to the hearing panel. The letter stated that plaintiff had been issued "numerous warning letters for delay of freight." Wsol did not object to this statement despite the fact that only two such letters had been issued within the relevant nine-month period under the collective bargaining agreement.

Nor did Wsol present the committee with evidence of plaintiff's seniority, safe driving awards or any other evidence favorable to the plaintiff. Rankin instructed Ehlenfeldt not to present a written argument which he had prepared to the Committee at the hearing.

Plaintiff's relationship with the union was apparently good, there being no evidence presented of union animos-

ity toward the plaintiff. The argument that plaintiff was ill because of exhaust fumes was advanced by Wsol before the committee.

This action was filed on September 24, 1982, the claim being based on § 301, LMRA, 29 U.S.C. § 185.

MEMORANDUM

In order to ultimately prevail in this lawsuit, Ehlenfeldt must show that his discharge was without cause, in violation of the contract between his union and the company. But, in order to reach this question, plaintiff must first establish that his union violated its duty of fair representation. *Vaca v. Sipes,* 386 U.S. 171 (1967). The motions of the defendants address this preliminary question.

The standard of union default needed to breach the duty of fair representation has been the subject of frequent litigation in this and other circuits. While the standard has been clarified in some recent cases (which will be further discussed), this Court is troubled by the reluctance of the Court of Appeals to overrule two earlier cases which bear striking similarities to this one.

In *Baldini v. Local 1095,* 581 F.2d 145 (7th Cir. 1978), the Court reversed a grant of summary judgment to the defendants. The plaintiff had filed a grievance which had been processed through one stage of the grievance procedure and was apparently told by the union that the union would carry on through arbitration. The union then failed to fulfill its promise. Further, the union failed to bring to the company's attention the fact that the plaintiff had witnesses supporting his version of disputed facts. The Court decided that these facts supported an inference

of innocence on the part of the union and also an inference that the union's conduct was arbitrary or in bad faith. The Court concluded:

> We note also in this regard the sound axiom that questions of motive, design, and intent are particularly inappropriate for summary adjudication.

Id. at 151.

In *Miller v. Gateway Trans. Co., Inc.*, 616 F.2d 272 (7th Cir. 1980), a case strikingly similar to this one, the Court again reversed a grant of summary judgment. The *Miller* plaintiff had been warned and suspended for refusing to drive a truck which, according to him, exceeded legal height limits. He was thereafter fired for questioning the legality of the amount of time needed to complete a trip. The union representative merely read the written grievances prepared by the plaintiff and did nothing to investigate whether either of the plaintiff's legal challenges were justified. If the plaintiff's position regarding the first challenge, the height question, were upheld, he could not have been fired for the second challenge. The Court, applying as a standard the phrase "seriously undermines the integrity of the arbitral process" from *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), stated:

> The present record does not exonerate the union under this standard. So far as appears, the union's representation consisted solely of a perfunctory reading of Miller's *pro se* written grievances. No effort was made to urge the absence of the warning letter predicate to Miller's eight-day suspension. No investigation was made into the incident involving the height of the truck that gave rise to that suspension; nor was any attempt made to find witnesses to that incident or to obtain relevant records relating thereto.

> The importance of that incident to the employer's right to discharge for the later misconduct seems not to have been noticed by the union representative. Faced with such a record, we cannot say Gateway has demonstrated the absence of any genuine issue as to any fact material to the question of fair representation.

ller, 616 F.2d at 277.

The departure from this line of cases started with the case of *Hoffman v. Lonza*, 658 F.2d 519 (7th Cir. 1981). The *Hoffman* plaintiff was aggrieved by the union's apparently innocent failure to file a necessary written request to proceed to a third stage in the grievance procedure. The Court stated:

> [I]t is apparent that an action based on a duty to fairly represent cannot be based solely on some action or omission by the union that results in an employee not receiving a "fair" hearing on the merits of a grievance. The legal action based on the union's duty to fairly represent might be more properly labeled as an action for the union *intentionally causing harm to an employee involved in a grievance proceeding.* The "duty" is not breached and the employee has *no remedy without substantial evidence of fraud, deceitful action or dishonest conduct.* (Emphasis supplied)

Id. at 522. In the face of a vigorous argument in the concurring opinion that the *Baldini* and *Gateway* cases did not allow for such a strict standard, the Court noted that:

> In *Gateway*, the record indicated that the union had made no effort to represent the employee. This circumstance permitted inferences that the union's conduct was "arbitrary, discriminatory, or in bad faith."

Hoffman, at 521. Thus, without explicitly overruling a case decided on a more lenient standard, the Court of

Appeals adopted a standard which the *Gateway* plaintiff could probably not meet.

This strict standard has been solidified in more recent cases. In *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983), the plaintiff had been denied compensation for a period he spent in jail after being arrested for violating a traffic regulation. In the second stage of the grievance process, he was represented by a union representative who had never interviewed him nor investigated the grievance, and remained silent throughout the hearing. The Court stated:

> The darkest picture Dober can paint is that in substituting Coco for Navigato and then not requiring Coco to interview Dober before the hearing the union was inept, lackluster, careless; and as *Hoffman* and the cases following it make clear, negligence, even when gross, does not violate the duty of fair representation.

Id. at 294.

This statement was prefaced by a discussion of the *Hoffman* standard:

> [T]his Court "limit[ed] suits for breach of the duty to fairly represent to instances of intentional misconduct by unions." Although Judge Cudahy, in a concurring opinion, contended that a standard of intentional misconduct was too limited, and cited two earlier Seventh Circuit cases, distinguished but not overruled in *Hoffman* . . . that could be read to embrace a broader standard, a series of cases in which different panels of this Court have followed *Hoffman* make clear that it is indeed the law of this Circuit.

Id. (citations omitted). The Court then reaffirmed that the "standard is intentional misconduct." *Id.* at 295.

Judge Cudahy, concurring in *Dober* as he did in *Hoffman,* illustrates the dilemma that this Court faces in this case:

> [The majority] attempts to distinguish *Baldini* and *Miller* on the grounds that "the records in both cases indicated that the unions *may* have acted in bad faith." . . . This is hardly a legitimate basis of distinction in the face of the clear language of the opinions . . . So I must respectfully assert that *Baldini* and *Miller* stand in stark opposition to the majority's analysis here as well as to the approach in *Superczynski* [*v. P.T.O. Services, Inc.,* 706 F.2d 200 (7th Cir. 1983)]. *Baldini* and *Miller* have not been successfully distinguished, and so far as I can tell, the law of this circuit has become a function of how emphatically a panel or panels can assert the proposition of their choice in the face of clearly contrary precedent.

Id. at 296 (Judge Cudahy, concurring). This Court means to express no opinion as to what the standard ought to be; that is, whether the standard ought to be intentional misconduct or some other standard less strict. As *Dober* makes abundantly clear, that decision has been made. This Court believes that it is, in this case, faced with a situation comparable to the *Miller* and *Dober* cases, where the union's performance can be described as considerably less than conscientious.

Plaintiff in his brief paints a picture, as the Court of Appeals did for *Dober,* which characterizes his facts fairly and which this Court can accept for purposes of this motion:

> Ehlenfeldt has arguably established that the Union and its agents failed to investigate his grievance; failed to adequately advise him as to the Waiver agreement; permitted the Company to make reference

> to warning letters far outside the nine month prohibition within the Agreement; failed to present Ehlenfeldt's letter in rebuttal to the warning letter of October 29, 1981; and failed to present supportive information in Ehlenfeldt's defense. Further, Ehlenfeldt has arguably established that the Company and its agents terminated Ehlenfeldt without just cause in that numerous other employees were also guilty of delay of freight and yet were not discharged.

Pl. Brief, page 12. These facts, plaintiff asserts, create at least an inference that the defendants acted fraululently, deceitfully or dishonestly under *Hoffman.*

With all due respect, these facts do not permit an inference of intentional misconduct which is necessary under *Hoffman.* They might describe "perfunctory" performance of the union's obligation, but not of a type that can be legitimately described as *deliberate* refusal "to do more than go through the motions." *Graf v. Elgin, Joliet and Eastern Ry. Co.,* 697 F.2d 771, 778 (7th Cir. 1983). There is no evidence from which deliberateness, that is, intent, can be inferred.

This case resembles both *Dober* and *Miller.* In a sense, it is more serious an example of union failure than *Dober* because, here, the union representative did much more than sit mute. In the same sense, it is less serious than *Miller.* The *Miller* plaintiff suffered a default because his representative did nothing but read the grievance. Ehlenfeldt's representative presented some argument. Yet the Court of Appeals reversed summary judgment for the defendants in *Miller* and affirmed summary judgment for the defendants in *Dober.*

Despite the compelling similarities between this case and *Miller,* the Court must conclude that Ehlenfeldt can-

not meet the standard of default adopted, and reiterated, since that time. Plaintiff may be able to make out a case of serious failure of advocacy on the part of his union representative. But there is no evidence that plaintiff was "on the outs" with the union from which intent for the union conduct might be inferred. Cf. *Graf,* supra, at 779, *Superczynski,* supra, at 203, *Dober,* supra, at 294. In fact, the evidence, from plaintiff's deposition, is to the contrary. The Court does not fault the plaintiff for his failure to be more forceful at the time of his discharge hearing because he had reason to trust his union spokesman. But neither can the Court allow an inference of intent from the fact that plaintiff was nearing retirement. Unless the union can be shown to have had reason to punish the plaintiff, or unless there is evidence that the union makes it a practice to acquiesce in discharges of workers nearing retirement, there is no reason to believe that the union's activity was intentional or discriminatory.

This is not just a weak case. Under the facts brought to the Court's attention for this motion, it is an impossible case because there is no evidence from which intentional misconduct on the part of the union can be inferred. The standard of intentional misconduct, it might be argued, is too strict. But the standard was set by the Court of Appeals with due regard for the consequences and the decision was a conscious one. It is not up to this Court to change it.

With regard to plaintiff's pendent state claim for conspiracy, the Court need not face the merits. Because plaintiff's federal claims are dismissed before trial, the pendent state claims must also be dismissed. *United Mineworkers v. Gibbs,* 383 U.S. 715 (1966).

Accordingly,

ORDER

IT IS ORDERED that the motions of the defendants for summary judgment are GRANTED.

IT IS FURTHER ORDERED that plaintiff's pendent state claim is DISMISSED for the lack of a substantial federal question.

Let judgment be entered in favor of the defendants dismissing the plaintiff's complaint with prejudice and costs; except that the plaintiff's pendent state claim of civil conspiracy to defraud is dismissed without prejudice.

Entered this 27th day of January, 1984.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

APPENDIX C

Unpublished Per Curiam Order

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 29, 1985.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. CLEMENT F. HAYNSWORTH, JR.,
Senior Circuit Judge*

ANTHONY EHLENFELDT,

Plaintiff-Appellant,

No. 84-1301

vs.

C.W. TRANSPORT, INC. and LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin. No. 82 C 781
Judge John C. Shabaz

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*The Honorable Clement F. Haynsworth, Jr., United States Senior Circuit Judge for the Fourth Circuit Court of Appeals is sitting by designation.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action Docket No. 82-C-781-S

ANTHONY EHLENFELDT,

Plaintiff,

vs.

C.S. TRANSPORT, INC., ET AL.,

JUDGMENT

This action came on for consideration before the court, United States District Judge John C. Shabaz presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged.....

that defendants' motions for summary judgment are granted and judgment is entered in favor of the defendants dismissing the plaintiff's complaint with prejudice and costs; except that the plaintiff's pendent state claim of civil conspiracy to defraud is dismissed without prejudice.

Copy of this document has been mailed to the following attorneys: Gingras, Pierce, Benn & Uelmen this 7th day of February, 1984.

By: D.J. Meyer, Deputy Clerk.

Dated at: Madison, Wisconsin

Date: February 7, 1984

/s/ Joseph W. Skupniewitz
Clerk of the Court

APPENDIX E

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations

(a)Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal

office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States, upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)